

## **4-5.000**

# **TORT LITIGATION**

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### 4-5.100 Tort Litigation -- Generally

Tort litigation against the Federal Government is under the general supervision of the Civil Division's Torts Branch. The Torts Branch has four different litigation offices or staffs, each of which specializes in a different area.

- The *Aviation and Admiralty* Staff handles claims arising out of the government's role as aircraft or ship owner and as regulator of both air traffic and the nation's coastal and inland waterways.
- The *Constitutional and Specialized Torts* Staff represents federal employees sued in their individual capacities for actions taken within the scope of their employment and handles matters arising out of claims under the Vaccine and Radiation Exposure compensation programs.
- The *Environmental Torts* (formerly Environmental and Occupational Disease Litigation) Staff handles property and personal injury cases involving toxic substances in the environment, the workplace, and government-owned housing.
- The *Federal Tort Claims Act Staff* handles all other tort claims, including traditional actions against the government for personal injury and property damage.

Cases brought under the Federal Tort Claims Act may be the responsibility of any one of the four staffs, depending upon the subject matter. Although different categories of tort cases are the responsibility of the different staffs of the Torts Branch, many aspects of defending a federal tort lawsuit are common to all, or several, categories of tort cases. For example, many of the defenses available under the Federal Tort Claims Act may be equally applicable in aviation cases, general tort cases, and cases involving exposure to hazardous substances. Similarly, it is not uncommon for a single case to present alternative causes of action which cross the boundary between particular categories. For example, a single case will often include both a constitutional tort claim against individuals and a general tort claim against the government. In addition, as will be discussed, *infra*, some related contract issues may be handled by the Torts Branch, and, in some circumstances, cases may be the joint responsibility of the Torts Branch and other components of the Civil Division or other Divisions of the Department.

### 4-5.110 Torts Branch Components -- Aviation and Admiralty

The Aviation and Admiralty staff represents the government in its role as owner of ships and regulator of the nation's coastal waters and inland waterways. Admiralty litigation may involve suits under statutes such as the Suits in Admiralty Act, the Public Vessels Act, and the Contract Disputes Act. Issues in admiralty may involve cargo damage, ship collision, contracts, and pollution in navigable waters. Aviation litigation arises from private and military air carrier operations and from the government's ownership and operation of both civil and military aircraft. The government's role in air traffic control, aircraft and airport certification, and dissemination of weather information is often involved in these cases.

### 4-5.120 Torts Branch Components -- Constitutional and Specialized Torts

The Constitutional and Specialized Torts staff represents current and former Government officials who are personally sued for monetary damages as a result of actions taken in the course of their official duties. An exception to this is that all cases relating to the delivery or failure to deliver medical care to prisoners, including Bivens actions, should be sent to the FTCA staff. This staff also represents the government in claims brought against the Secretary of Health and Human Services under the National Vaccine Injury Compensation Program.

Cases under the Program are litigated in the U.S. Court of Federal Claims and involve allegations of injuries and death attributable to the receipt of certain childhood vaccines. Further, this section is responsible for reviewing claims and compensating victims of radiation exposure from atmospheric nuclear testing and uranium mining under the Radiation Exposure Compensation Act.

#### **4-5.130 Torts Branch Components -- Environmental Torts (formerly Environmental and Occupational Disease Litigation)**

The Environmental Torts (ET) staff defends the United States in cases arising from allegations of personal injuries and property damage due to exposure to toxic materials resulting from federal activities. Ongoing litigation addresses complaints of injuries caused by air, surface-water, or groundwater contamination; housing and facility construction/renovation programs; and radiation experimentation. These cases include exposure to substances such as TCE, PCBs and dioxins, asbestos, lead-based paint, Agent Orange, Legionella bacteria, radiation, electric magnetic fields and biological agents. Tort cases alleging toxic injury to persons or property in the course of EPA's clean-up activities are the responsibility of ET.

#### **4-5.140 Torts Branch Components -- Federal Tort Claims Act Staff**

The Federal Tort Claims Act Staff defends the government against tort suits including, for example, such areas as medical malpractice, personal injuries attributed to the actions of government employees, and Governmental Regulatory activities. This staff is also responsible for affirmative tort claims not encompassed within another staff's responsibilities. Any tort suit not within the responsibility of the other three staffs is the responsibility of the FTCA Staff.

#### **4-5.200 Torts Branch Procedures -- Conduct of FTCA Litigation**

Upon service of a complaint sounding in tort, the United States Attorney shall promptly forward a copy of that complaint to the appropriate component within the Torts Branch. The forwarding letter should indicate the date of service on the United States Attorney's Office and the name of the judge to whom the case has been assigned.

After receiving a copy of the summons and complaint in a suit under the Federal Tort Claims Act the appropriate staff of the Torts Branch will notify the United States Attorney by letter of whether litigation responsibility for the case is designated as "primary," "joint," "monitored," or "delegated" within the Torts Branch. *See* USAM 4-1.310 *et seq.*

If an adverse judgment is received in a delegated FTCA case, the amount of the judgment is less than \$500,000 and no significant issue is presented by the adverse decision, and both the United States Attorney and the affected agency recommend against appeal, the judgment can be promptly forwarded to the Tort Branch Director responsible for the matter who is authorized to determine against appeal, provided the determination is made within thirty days after entry of judgment. All other matters involving adverse judgments, the adverse judgments along with comments and supporting materials must be forwarded to the Appellate Staff: a copy of these materials also should be forwarded to the Torts Branch.

Copies of all compromise memoranda should be forwarded to the appropriate Torts Branch staff. Addresses are provided in USAM 4-5.300, 400, 500, and 600.

#### **4-5.220 Torts Branch Procedures -- Substantive Considerations in FTCA Litigation**

The Assistant United States Attorney assigned to a tort suit is expected to assume full responsibility for preparation of an aggressive, professional defense to the suit, unless the suit is one assigned to be handled directly by a component of the Torts Branch. The initial letter from the Torts Branch will request the agency to forward a litigation report to the Assistant United States Attorney. This litigation report will be the starting point for development of the facts and legal position to be taken in the litigation. However, the Assistant United States Attorney is responsible for ensuring that each reasonable legal and factual defense is pursued regardless of whether the agency litigation report identifies the defense. The Torts Branch Monographs and, particularly the FTCA Staff's Monograph "Checklist of FTCA Defenses," provide assistance.

The Assistant United States Attorney should obtain approval from the appropriate Torts Branch Staff prior to raising the "discretionary function exception" defense in any case and may well desire to consult with the Branch when a difficult issue pertaining to any of the exceptions or exclusions to the Federal Tort Claims Act arises. If the case is designated as a monitored case, Assistant United States Attorney may seek assistance from the Torts Branch attorney or reviewer designated in the initial letter from the Torts Branch to the agency requesting a litigation report. If the case is designated as a delegated case, the author of the appropriate Monograph, if any, should be contacted or inquiry may be made by calling the responsible Director's office.

The FTCA is the exclusive remedy for common law torts committed by federal employees acting in the scope of employment. United States Attorneys are authorized to make the certification required by law (28 U.S.C. § 2679(d)(1)) in order to substitute the United States for a federal employee against whom a common law tort suit is brought. *See* 28 C.F.R. § 15.3.

#### **4-5.230 Torts Branch Procedures -- Settlement of Federal Tort Claims Act Suits**

United States Attorneys responsible for the defense of FTCA or other tort litigation (e.g., Suits in Admiralty Act or Vessels Act) are currently delegated \$1,000,000 in settlement authority, subject to the limitations set forth in Civil Division Directive No. 14-95, 28 C.F.R. Pt. O, Sub. Pt. Y, App. If a United States Attorney seeks to settle for an amount in excess of the delegated authority, a detailed justification for the settlement must be forwarded to the Torts Branch. The responsible Director will then make a recommendation to the Assistant Attorney General (or if the proposed amount is in excess of \$2,000,000 to the Associate Attorney General). Although the Torts Branch endeavors to expedite consideration of settlement proposals, opposing counsel and, if necessary, the court should be informed that immediate action cannot be guaranteed on any settlement proposal. It is customary to consult with the Torts Branch during settlement negotiations when any concern arises regarding the advisability of settlement or of the amount of the settlement. Although authority to settle a case can be obtained in exceptional cases prior to submission of an authorized offer from the other party(ies) to the case, this procedure is highly disfavored and should not be used unless special justification for its use is provided. However, the Torts Branch will provide counsel as to what amount it will recommend to the Assistant Attorney General in advance of initiation or completion of settlement negotiations.

Stipulations for admissions which are tantamount to a stipulation of liability must be approved by whatever level of authority is appropriate based on the highest reasonably predictable judgment that the court could enter predicated upon the stipulation or admission.

#### **4-5.240 Torts Branch Procedures -- FTCA Payment Procedure**

The procedures for payment of an FTCA settlement should not be initiated until after all required approvals are obtained. Most FTCA settlements are paid by means of a Treasury check issued upon making a request to the Department of the Treasury. Forms for use in transmitting requests for payment to the Treasury Department are included in the Civil Resource Manual at 224 *et seq.*

Structured settlement agreements require careful attention to the terms and provisions of the agreement. The Torts Branch is available to be consulted regarding the particular terms of a structured settlement. Copies of the final settlement papers should be forwarded to the Torts Branch for retention. In the event that a reversionary trust provision is included in a structured settlement, the trust should include a requirement that the reversionary interest be paid to the United States Treasury in care of the Torts Branch pursuant to the terms of the agreement. Further information on the format and provisions for structured settlements is included in the Torts Branch Handbook entitled "Damages Under the FTCA."

#### **4-5.300     Aviation and Admiralty Litigation -- Contacts and Mailing Information**

Gary W. Allen, **Director**, (202) 616-4000, SS07(ALLEN).

**Admiralty:** David v. Hutchinson, Assistant Director for Admiralty, (202) 616-4126, SS07(HUTCHINS); Debra J. Kossow, Senior Admiralty Counsel, (202) 616-4070, SS07 (KOSSOW); Scott R. Blaze, Senior Admiralty Counsel, (202) 616-4042, SS07(BLAZE).

**Aviation:** Kathlynn Fadely, Assistant Director for Aviation, (202) 616-4044, SS07(FADELY); Steven J. Riegel, Senior Aviation Counsel, (202) 616-4049, SS07(RIEGEL); James C. Wilson, Senior Aviation Counsel, (202) 616-4055, SS07(WILSON); Barbara B. O'Malley, Special Litigation Counsel, (202) 616-4081, SS07(OMALLEY).

**New York Field Office:** Janis Schulmeisters, Attorney in Charge, (212) 264-0480, civ20(jschulme); Jack S. Rockafellow, Assistant Attorney in Charge, (212) 264-0482, civ20(jrockafe). **Mailing & Delivery:** Aviation & Admiralty Litigation, Torts Branch, Civil Division, 26 Federal Plaza, Suite 320, New York, NY 10278-0140. **West Coast Field Office:** Philip A. Berns, Attorney in Charge, (415) 436-6630, civ21(pberns); Warren A. Schneider, Assistant Attorney in Charge, (415) 436-6645, civ21(wschneid). **Mailing:** Aviation & Admiralty Litigation, Torts Branch, Civil Division, West Coast Field Office, 450 Golden Gate Ave., P.O. Box 36028, San Francisco, CA 94102-3463.

#### **4-5.310     Admiralty Litigation**

The Admiralty staff of the Torts Branch specializes, on the defensive side, in cases involving collisions at sea, groundings, seamen's injuries, search and rescue and other actions relating to the government's regulation of the nation's waterways. On the affirmative side, the cases include mortgage foreclosure, oil pollution and damage to government property. The admiralty staff also handles cases filed in district courts involving maritime contracts, both defensive and affirmative. The Admiralty staff generally retains primary responsibility for the defense of admiralty litigation, including preparation and trial. In any admiralty case handled primarily by an Assistant United States Attorney, there should be close cooperation with the Admiralty staff.

Two field offices handle the bulk of New York area and West Coast maritime cases because of the number of cases arising in these port areas and the active presence of major client agencies in these areas. Maritime cases involving New York or nearby environs generally are handled by the New York Field Office located in New York City. Cases brought in West Coast states, as well as in Alaska, Hawaii and Guam, are generally handled by the West Coast Field Office in San Francisco.

#### **4-5.320     Aviation Litigation**

The Aviation staff specializes in the defense of aviation cases arising primarily out of the activities of the FAA, NWS, NOAA and the military services. The Aviation staff generally retains primary responsibility for the defense of aviation litigation, including preparation and trial, particularly if questions of broad national import

with particular precedential significance are involved, or if the litigation will raise questions concerning the use of air traffic control services or dissemination of weather and in-flight information to operators of commercial and private aircraft. In any aviation case handled primarily by an Assistant United States Attorney, there should be close cooperation with the Aviation Staff.

#### **4-5.400 Constitutional and Specialized Torts -- Contacts and Mailing Information**

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Nicki L. Koutsis, Assistant Director, (202) 616-4150, civ10(nkoutsis).

Gordon W. Daiger, Senior Trial Counsel, (202) 616-4330, civ10(gdaiger); Timothy P. Garren, (202) 616-4171, civ10(tgarren); R. Joseph Sher, Senior Trial Counsel, (202) 616-4328, civ10(jsher).

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#### **4-5.410 Constitutional and Specialized Torts -- Introduction**

The Constitutional Torts staff defends present and former government officials in suits seeking damages against them in their official and individual capacities based upon official conduct. Pursuant to 28 U.S.C. §§ 516 to 519, the Attorney General and the Department of Justice are responsible for attending to the interests of the United States in litigation which includes providing representation to present and former government employees who are sued for actions taken within the scope of their employment. Policy guidelines for Department of Justice representation are published at 28 C.F.R. §§ 50.15 and 50.16. The Constitutional Tort staff processes the majority of representation requests in suits against individual federal employees, and questions regarding representation requests should be directed to that staff.

Personal damages claims against individuals raise special concerns that are critical to their defense and with which the government attorney must be able to deal effectively. These are discussed briefly in subsequent sections.

#### **4-5.412 Constitutional Torts -- Representation Process**

**A. Generally.** Personal representation of government employees is necessary only when they are sued in an individual capacity, for damages. When a government employee is sued in an official capacity, the real defendant is the United States. Should relief be awarded, it would be against the resources of the United States. The Department of Justice represents federal officials sued in their official capacities for declaratory, injunctive or other forms of relief. No formal request for representation is necessary in such cases.

When an employee (present or former) is sued in his or her individual capacity, he or she is the personal target of the lawsuit. The plaintiff seeks recovery from the personal assets of the employee as opposed to the assets of the United States. Additionally, it is noted that in most instances a federal employee providing testimony (i.e. deposition), and who is not a party to the action, does not need personal representation and Department of Justice representation will not be authorized. In any case in which there is doubt as to whether an employee is sued in his individual capacity for constitutional or federal statutory violations, authority to represent the official individually should be secured from the Department pursuant to 28 C.F.R. § 50.15.

**B. Criteria.** Department of Justice representation is generally not available in a federal criminal proceeding or investigation. 28 C.F.R. § 50.15(a)(4). Nor is it available in a civil case if the employee is the subject of a federal criminal investigation concerning the act or acts for which he seeks representation. *See* 28 C.F.R. § 50.15(a)(5) to (7). In such a civil case, however, private counsel may be provided to the employee at federal expense, provided no decision has been made to seek an indictment or file an information against the employee. 28 C.F.R. § 50.15(a)(7).

The criteria for personal representation of an employee are:

**1. Scope of employment.** The employee's actions giving rise to the suit must reasonably appear to have been performed within the scope of his/her federal employment.

**2. Interest of the United States.** It must also be in the interest of the United States to provide the requested representation. 28 C.F.R. § 50.15(a). The Department of Justice is ultimately responsible for making the "scope" and "interest" determinations after benefiting from the agency recommendation. Because the Executive Branch is responsible for determining the interests of the United States in litigation, decisions of this nature are precluded from Judicial Branch scrutiny by the doctrine of separation of powers. *Falkowski v. Equal Employment Opportunity Commission*, 764 F.2d 907 (D.C. Cir. 1985), *reh'g denied*, 783 F.2d 252 (D.C. Cir.), *cert. denied*, 478 U.S. 1013 (1986).

**C. Procedure for Requesting Department of Justice Representation.**

**1. Generally.** Department of Justice representation is neither automatic nor compulsory; federal employees are free to retain counsel of their choice at their own expense. Every individual defendant who desires Department of Justice representation must request it in writing. The written request should be submitted to the individual's employing agency (usually the Office of the General Counsel, Chief Counsel, or Solicitor) along with a copy of the Summons and Complaint or other legal papers. The agency should then forward the request with all available factual information to the Department of Justice with a recommendation as to whether representation should be provided based upon the criteria of "scope" and "interest." It is also suggested that a courtesy copy of the papers be provided to the United States Attorney in the district where the suit is filed.

**2. Conditional Representation.** Frequently, a representation request must be resolved quickly. In such cases, telephone approval may be secured from the Director, Assistant Director, or Senior Trial Counsel of the Constitutional Torts Staff. *See* 28 C.F.R. § 50.15(a)(1). This approval is conditional and must be supplemented by the aforementioned written materials. Additionally, United States Attorneys have automatic authority to seek extensions of time in which to respond to a complaint.

**D. Representation Agreements.** Upon formal approval of representation, the litigating attorney should forward a Form 399 to the client for signature and return. The form sets forth the limitations of Department of Justice representation so that the client may be fully informed before he or she enters into the attorney-client relationship. *See* Department of Justice Order 2770.5.

**E. Appellate Review.** Whenever the Solicitor General declines to authorize an appeal on behalf of an employee or representation of the employee involves assertion of a position that conflicts with the interest of the United States, the Department may not continue to represent the employee if: (1) the employee does not knowingly agree to forego appeal or waive assertion of the position; or (2) the assigned attorney determines, after consultation with his or her supervisor (and, if appropriate, with the litigating division) that an appeal or assertion of the position is necessary to the employee's adequate representation. 28 C.F.R. § 50.15(a)(11). However, in appropriate cases, private counsel may be provided at federal expense. 28 C.F.R. § 50.15(a)(11)(iii).

**F. Payment of Adverse Judgments.** Regardless of whether representation is provided by the Department of Justice, a federal employee remains personally responsible for the satisfaction of a judgment entered solely against the employee; there is no right to compel indemnification from the United States or an agency thereof in the event of an adverse judgment. However, the Attorney General may authorize indemnification of Department of Justice employees for adverse judgments or, in exceptional circumstances, for adverse settlements. *See* 28 C.F.R. § 50.15 (c). Some other agencies have similar regulations allowing indemnification of their employees.

**G. Private Counsel.** Where conflicts in the factual or legal positions of a number of defendants make representation by a single attorney impossible, retention of private counsel at government expense may be authorized, provided the scope and interest criteria have been satisfied and subject to the availability of funds. *See* 28 C.F.R. § 50.15(a) (10) and 50.16. Special written agreements between the Department of Justice and private counsel are required. *See* Administrative Directive 2120.

#### **4-5.415 Constitutional Torts -- Appealability of Immunity Claims**

The current immunity doctrines not only are designed to protect officials from liability but from the burdens of litigation as well. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Accordingly, an order denying an absolute immunity defense is immediately appealable, to the extent that it turns on an issue of law. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). In *Johnson v. Jones*, 515 U.S. 304 (1995), the Supreme Court held that a pretrial order denying qualified immunity is not immediately appealable to the extent that the order "determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." 515 U.S. at 319. Nevertheless, appellate jurisdiction will still exist over the district court's determination that a violation of clearly established law has been shown on a given set of facts, or that a factual dispute is material to the issue of qualified immunity. *See Behrens v. Pelletier*, \_\_\_ U.S. \_\_\_, 116 S.Ct. 834, 842 (1996). Regarding any possible appeal of a denial of immunity, very close contact should be maintained with the Torts Branch and Appellate Staff. *See* 28 C.F.R. § 50.15(a)(11).

#### **4-5.420 National Vaccine Injury Compensation Program -- Contacts and Mailing Information**

John L. Euler, (202) 616-4088, Deputy Director.

Charles R. Gross, (202) 616-4131, Assistant Director.

Gerard W. Fischer, (202) 616-4090, Assistant Director.

**Mailing:** National Vaccine Injury Compensation Program

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#### **4-5.421 National Vaccine Injury Compensation Program -- Introduction**

The National Vaccine Injury Compensation Program (42 U.S.C. §§ 300aa-10 through 17) (the "Program"), which is part of the National Childhood Vaccine Injury Act of 1986 (the "Vaccine Act"), establishes a compensation system for persons injured by routine pediatric vaccines. The Program recognizes and furthers the public interest in encouraging the availability and use of these vaccines by offering an alternative to traditional tort actions against vaccine administrators and manufacturers for alleged serious adverse reactions.



The Vaccine Litigation Group in the Torts Branch of the Civil Division defends all claims brought against the Secretary of Health and Human Services under the Vaccine Act. These Vaccine Act cases are filed in the United States Court of Federal Claims by individuals claiming to have suffered injuries as a result of the receipt of certain specified vaccines. The cases routinely involve claims of catastrophic injuries or death. As a result, the cases present unique challenges and require diverse litigation skills of the Department of Justice trial attorneys who defend them.

#### **4-5.422 Disposition of Cases Under the Vaccine Program**

The Vaccine Act established within the United States Court of Federal Claims an Office of Special Masters. When a petition for vaccine compensation is filed, the chief special master assigns the case to a special master who makes an initial determination as to whether entitlement to an award should be granted. In many cases, a trial is necessary to decide the issue of entitlement under the Program. Although the court is located in Washington, D.C., the entitlement hearing is usually held in the state where the vaccine-injured party resides.

After the special master enters the entitlement decision, either party may appeal the outcome to the United States Court of Federal Claims. The Court of Federal Claims reviews the decision and enters judgment. The decision of the Court of Federal Claims may then be appealed to the United States Court of Appeals for the Federal Circuit.

A finding of vaccine-causation is made in one of two ways. The claimant may show vaccine-causation by proving a specified injury occurred within a specified time period following vaccination. This entitles the claimant to a presumption of vaccine-causation that can only be rebutted if we establish, by preponderant evidence, a cause for the alleged injury other than the vaccine. If the claimant cannot meet the requirements for a presumptively vaccine-related injury, the claimant must prove vaccine-causation under more traditional standards of proof used in tort litigation. In either situation,

these cases require the development of detailed factual evidence and medical evidence from various medical specialties, such as neurology, pediatrics, immunology, rheumatology, epidemiology, infectious diseases, pathology and virology.

Once a determination of vaccine-causation is made, the claimant is generally entitled to compensation for all future unreimbursable medical expenses related to the vaccine injury. For cases arising after the date of the Vaccine Act, claimants are also entitled to lost wages, pain and suffering up to a jurisdictional maximum of \$250,000, and reasonable attorney's fees and costs. For cases involving vaccinations administered prior to the Vaccine Act's effective date, there is a cap of \$30,000 on the combined items of pain and suffering, lost wages and reasonable attorneys' fees and costs. There is no provision for punitive damages. In all cases resulting in a vaccine-related death, a fixed payment of \$250,000 is provided.

Because of the severity of most vaccine injuries and the likelihood of lifelong future damages, vaccine cases require a complex economic analysis of the damage payments to be made to the injured party through lump sum payments, annuities, or reversionary trusts. The damages analysis includes interpretation of statutory compensation provisions and legal precedent for pain and suffering, medical care, residential care, attendant care, therapies, and lost wages. Consideration must also be given to other primary benefits to which the injured party is entitled such as private insurance, Medicaid, Medicare, and benefits under the Individuals With Disabilities Education Act (IDEA). Under the statute, these benefits may be offset against the award.

#### **4-5.423 Action Following Receipt of a Vaccine Case**

Any vaccine injury compensation case received in the office of a United States Attorney should be forwarded immediately to the Vaccine Litigation Section of the Constitutional and Specialized Tort Branch for handling. If such a proceeding has been filed in the United States District Court or a state court for resolution, rather than

the appropriate forum of the United States Court of Federal Claims, similar action should be taken to notify the Vaccine Litigation Section so appropriate steps may be taken in cooperation with the United States Attorney to either dismiss the case, or remove it to the Court of Federal Claims.

#### **4-5.430 Radiation Exposure Compensation Program -- Contacts and Mailing Information**

Gerard W. Fischer, (202) 616-4090, civ10(gfischer), Assistant Director.

Lori Beg, (202) 616-4377, civ10(lbeg), Trial Attorney.

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#### **4-5.431 Radiation Exposure Compensation Program -- Introduction**

On October 15, 1990, Congress passed the Radiation Exposure Compensation Act (the "Act"), 42 U.S.C. § 2210 note (Supp. 1995), which provides for compassionate payments to, or on behalf of, individuals who contracted certain cancers and other serious diseases following exposure to radiation that was released during above-ground nuclear weapons tests or as a result of their exposure to radiation during employment in uranium mines.

The Radiation Exposure Compensation Program (the "Radiation Program"), part of the Torts Branch, Civil Division, is responsible for administering the Act. The procedures established in the implementing regulations are designed to utilize existing records so that claims can be quickly resolved in a reliable, objective, nonadversarial manner with little administrative cost to the United States or to the person filing the claim. Part 79 of Title 28, Code of Federal Regulations.

#### **4-5.432 Radiation Exposure Compensation Program -- Categories and Criteria**

There are three categories of claims: uranium miners, downwinders, and onsite participants. There are two major eligibility criteria for each category of claims: exposure to radiation and subsequent development of a compensable disease.

The uranium miner provisions of the Act provide a payment of \$100,000 to, or on behalf of, underground uranium miners who worked in Arizona, Colorado, New Mexico, Wyoming or Utah during the years 1947 to 1971. The miner must have been exposed to certain threshold levels of radiation measured by working level months of radiation ("WLMs") during the course of his underground uranium mining activities. The miner also must have subsequently developed primary cancer of the lung or one of the following non-malignant respiratory diseases: pulmonary fibrosis, fibrosis of the lung, cor pulmonale related to fibrosis of the lung, and moderate or severe silicosis and pneumoconiosis. § 5(b)(3), 42 U.S.C. § 2210, 28 C.F.R. §§ 79.31(h), (i).

The downwinder provisions of the Act provide a payment of \$50,000 to, or on behalf of, individuals who lived or worked downwind of atmospheric nuclear tests in certain geographical areas in Utah, Nevada and Arizona for at least 24 months (cumulative or consecutive) during the time period of January 21, 1951, and ending on October 31, 1958, or the entire period from June 30, 1962, to July 31, 1962. In order to receive compensation under the "downwinder" provisions of the Act it must also be demonstrated that, after the requisite length of exposure, one of the following specified compensable diseases was developed: leukemia (but not

chronic lymphocytic leukemia), lymphoma (but not Hodgkin's disease), multiple myeloma, or primary cancer of the thyroid, female breast, esophagus, stomach, pharynx, small intestine, pancreas, bile duct, gall bladder, or liver. § 4(b)(2), 42 U.S.C. § 2210, 28 C.F.R. § 79.21(d). Each disease has its own additional requirements such as age at first exposure, latency period, and absence of heavy smoking and drinking. 28 C.F.R. § 79.22(b).

The onsite participant provisions of the Act provide a payment of \$75,000 to, or on behalf of, individuals who contracted a compensable disease after being present onsite, as a participant, during a period of atmospheric nuclear testing between July 16, 1945 and December 31, 1962. The test site locations where atmospheric nuclear testing occurred are: (1) the Nevada Test Site; (2) the Pacific Test Sites; (3) the Trinity Test Site; and (4) the South Atlantic Test Site. § 4(a)(2)(C), 42 U.S.C. § 2210, 28 C.F.R. §§ 79.42(a), (b). The onsite participant also must have developed one of the 13 cancers identified under the downwinder provisions.

#### **4-5.437 Action Following Receipt of a Radiation Program Claim**

The Act also affords the right to seek judicial review of a final action in a United States District Court. §6(l). If a case appealing a denial decision to a United States District Court is received, please notify Gerard Fischer, Assistant Director, at 202-616-4090, or Lori Beg, staff attorney, at 202-616-4377.

#### **4-5.500 Environmental Torts (Formerly Environmental and Occupational Disease Litigation (EODL)) -- Contacts and Mailing Information**

J. Patrick Glynn, (202) 616-4200, civ05(pglynn), Director.

JoAnn J. Bordeaux, (202) 616-4204, civ05(jbordeau), Deputy Director.

David S. Fishback, (202) 616-4206, civ05(dfishbac), Assistant Director.

**Mailing:** Torts Branch, Civil Division

United States Department of Justice

P.O. Box 340

Benjamin Franklin Station

Washington, D.C. 20044

#### **4-5.510 Environmental Torts (Formerly Environmental and Occupational Disease Litigation (EODL)) -- Introduction**

The Environmental Torts staff (formerly Environmental and Occupational Disease Litigation (EODL) staff) defends the United States in FTCA and other toxic tort actions arising from contamination of the environment or exposure in the workplace and elsewhere to chemicals or substances. Some of the most visible examples of the litigation over the past few years have been those cases dealing with groundwater contamination, radiation experimentation on human subjects, and exposure to asbestos. Other ongoing litigation addresses complaints of injuries allegedly caused by PCBs and dioxins, lead-based paint, Agent Orange, Legionella bacteria and other "sick building" toxins, electric magnetic fields and biological agents. Many of these cases arise out of activities of the military, but may stem from other agencies' activities, as well.

Toxic tort litigation involves direct personal injury and/or property damage actions and third-party claims by manufacturers and suppliers for contribution and indemnity. Claims are filed under the Federal Tort Claims Act, the Suits in Admiralty and Public Vessels Acts, the Little Tucker Act, and against individual government employees seeking monetary damages. The ET staff litigates in the district courts and the U.S. Court of Federal Claims. Tort cases alleging negligence in the course of EPA'S Clean-Up Activities are the responsibility of ET. Vessel-caused pollution and clean-up cost recovery cases are handled by the Aviation & Admiralty staff.

Inquiries regarding toxic tort and asbestos litigation may be made by calling 202-616-4200 or writing to the Environmental Torts section at Post Office Box 340, Benjamin Franklin Station, Washington, D.C. 20044. Federal Express deliveries should be mailed to EODL, Torts Branch, 1331 Pennsylvania Avenue, N.W., Suite 800 South, Washington, D.C. 20004.

#### **4-5.520 Conduct of Toxic Tort and Asbestos Litigation**

Environmental and related product liability tort actions, whether involving mass numbers of parties or only a few, pose special case management problems and thus are generally designated as "primary" to be handled by Department of Justice attorneys. Given long latency periods, the litigation often is not filed until decades after exposure. The cases can require massive and prolonged discovery involving millions of documents and the analysis of convoluted and complex fact situations. For example, in the asbestos litigation, fact issues have spanned a period since prior to World War II. All asbestos cases are designated for primary handling by ET and as a general rule will not be assigned to United States Attorneys.

Environmental tort litigation also requires familiarity with specialized scientific and medical issues. The source of contamination in any particular case may be chronic and latent, as with asbestos exposure or progressive groundwater contamination, or may be readily apparent, as with chemical or industrial spills. Disease or injury often manifests itself only following cumulative or repeated exposure, and in many instances, the effects of exposure have not been definitively scientifically or medically documented. Like the asbestos cases, fact issues can span decades, some spanning periods before World War I.

United States Attorneys confronted with environmental and related product liability tort claims against the United States should contact ET as early as possible, preferably before suit. ET is prepared to assume "primary" responsibility for toxic tort litigation as described within USAM 4-5.510.

It should be noted that tort suits alleging breaches of duty arising directly from *regulatory* activities of the government generally are within the purview of the Federal Tort Claims Act staff, and should be directed to that staff. *See* USAM 4-5.600. Matters involving clean-up activities of the Environmental Protection Agency, however, should immediately be brought to the attention of ET. Such cases should be handled jointly with the Environment and Natural Resources Division. Also, matters involving the Oil Pollution Act of 1990 should be referred to the Aviation and Admiralty staff.

ET's expertise developed in the asbestos litigation has led to the assignment of certain contract (Little Tucker Act and Tucker Act) cases to ET. Cases asserting implied warranties or indemnities arising out of contracts for government purchase of products made in conformity with government specifications where said products' alleged toxicity caused personal injuries should be referred to ET. *See, e.g., Hercules v. United States*, \_\_\_ U.S. \_\_\_, 116 S.Ct. 981 (1996) (Agent Orange); *Lopez v. A.C. & S.*, 858 F.2d 712 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904 (1989) (asbestos). In addition, cases where government contractors seek to invoke indemnity provisions to be held harmless from environmental regulatory claims and tort claims should be referred to ET.

#### **4-5.600 Federal Tort Claims Act Staff -- Contacts and Mailing Information**

Jeffrey Axelrad, (202) 616-4400, civ05(jaxelrad), Director.

Paul Figley, (202) 616-4248, civ05(pfigley), Deputy Director.

Assistant Directors: Roger D. Einerson, (202) 616-4250, civ05(reinerso); Phyllis J. Pyles, (202) 616-4252, civ05(ppyles).

**Mailing:** Civil Division  
United States Department of Justice  
P.O. Box 888  
Benjamin Franklin Station

#### **4-5.610 FTCA Staff -- Introduction**

The Federal Tort Claims Act (FTCA) Staff litigates cases filed against the United States under the FTCA (except for aviation and most environmental tort suits); tort suits filed in district courts under legislation extending the FTCA to Community and Migrant Health Centers and to Indian tribes; and affirmative tort suits on behalf of federal agencies. The Staff is also responsible for the administration of the FTCA.

The FTCA Staff litigates seminal suits filed under the FTCA and related statutes authorizing tort suits against the United States. Representative cases include AIDs litigation, medical malpractice, mine inspection, and banking litigation. The Staff initiates changes in Department regulations implementing the FTCA, which apply throughout the government. The Staff provides guidance to all federal agencies, subject to oversight by Department officials, on policy issues arising under the FTCA. In addition, the Staff resolves administrative claims arising from Department of Justice activities to the extent that such claims are not delegated for direct handling to units within the Department.

Although most of the Staff's work consists of handling litigation directly, the Staff also provides oversight and guidance to United States Attorneys' offices for FTCA litigation handled by those offices.

#### **4-5.620 FTCA Staff -- Research and Guidance Materials**

The Torts Branch has prepared Monographs and a Handbook covering many recurring substantive issues pertaining to Federal Tort Claims Act (FTCA) litigation. The current FTCA Monographs are:

1. Actionable Duty
2. Administrative Claim Sum Certain Requirement and the Ad Damnum Limitation
3. Administrative Claims
4. Checklist of FTCA Defenses
5. Claims Under Wrongful Death and Survival Statutes and Claims for Loss of Consortium
6. Discretionary Function Exception, Part A and Part B
7. FTCA Exception: Claims Arising in a Foreign Country
8. FTCA Statute of Limitations
9. Indemnity and Contribution
10. Law Enforcement Torts under the FTCA
11. The Doctrines of Loss of Chance and Increased Risk
12. Prejudgment and Postjudgment Interest in Federal Tort Claims Act Litigation
13. The Assault and Battery Exception
14. The FTCA'S Contractor Exclusion and Related Issues
15. The Misrepresentation Exception and the Interference with Contract Rights Exception
16. The Feres Doctrine

Each United States Attorney has received copies of the foregoing Monographs. If an Assistant United States Attorney needs an additional copy of a particular Monograph, it can be obtained by calling (202) 616-4233 or by writing to the Torts Branch, Post Office Box 888, Ben Franklin Station, Washington, D.C. 20044. In addition, a looseleaf handbook entitled "Damages Under the Federal Tort Claims Act" has been sent to each USAO and updated periodically. Contributions to the Damages Handbook are solicited from Assistant United States Attorneys.

#### **4-5.630 FTCA Staff -- Substitution of the United States for Federal Employees**

United States Attorneys are authorized to make the certification provided for in 10 U.S.C. § 1089(c), 22 U.S.C. § 817(c), 28 U.S.C. § 2679(d), 38 U.S.C. § 4116(c), and 42 U.S.C. §§ 233(c) and 2458a(c), in order to substitute the United States as defendant in place of federal employees acting within the scope of their federal employment who have been sued under state tort law. *See* 28 C.F.R. § 15.3.

#### **4-5.640 FTCA Staff -- Medical Care Recovery Act Cases**

Sections 2651 to 2653 of Title 42 authorize the recovery of the reasonable value of hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) which the United States is authorized or required by law to furnish or has furnished to a person who is injured or suffers a disease under circumstances creating tort liability upon the part of a third party.

Administrative agencies are bound by regulations promulgated by the Attorney General (28 C.F.R. §§ 43.1 to 43.4) and generally will prevail upon the insured person to assert the government's claim in his/her own name for the use and benefit of the United States. 42 U.S.C. § 2651(b)(1) authorizes the government to intervene in the insured person's tort suit as of absolute right. If intervention is necessary, the injured person can normally be counted on to establish the defendant's basic tort liability. Intervention should be utilized as a measure of last resort only if private counsel do not cooperate with the agency to protect our right to participate in agency recovery.

If advice is needed, the FTCA staff may be contacted at (202) 616-4254.

#### **4-5.650 FTCA Staff -- Medicare Recovery Cases**

Section 1395y(b)(1) of Title 42 provides that Medicare shall be a secondary payor in certain circumstances, including automobile accident cases or other instances where a third party would otherwise be liable for medical costs. This provision also expressly authorizes the United States to bring an independent action to recover from an insurer the cost of Medicare payments needed as a result of an automobile accident, or to join or intervene in any such action.

If advice is needed, the FTCA staff may be contacted at (202) 616-4296.